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FILED
26 APR 2004 3:27
DISTRICT OF UTAH
BY

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

THE SCO GROUP, INC.,

Plaintiff,

vs.

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant.

**CORRECTED
MOTION TO DISMISS OR TO
STAY COUNT TEN OF
COUNTERCLAIM-PLAINTIFF
IBM'S SECOND AMENDED
COUNTERCLAIMS AGAINST
SCO**

Case No. 2:03CV0294DAK

Hon. Dale A. Kimball

Magistrate Judge Brooke Wells

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Plaintiff/Counterclaim-Defendant The SCO Group (“SCO”), by and through undersigned counsel, hereby moves the Court pursuant to Federal Rule of Civil Procedure 12(b) for dismissal or, in the alternative, to stay Count Ten of Counterclaim-Plaintiff International Business Machines Corporation’s (“IBM”) Second Amended Counterclaims against SCO.

SCO bases its Motion on the following grounds:

On March 29, 2004, Defendant/Counter-Plaintiff International Business Machines Corp.. (“IBM”) filed its “Second Amended Counterclaims Against SCO.” In Count Ten of that pleading, IBM added an entirely new claim seeking a declaratory judgment “that IBM does not infringe, induce infringement of, or contribute to the infringement of any SCO copyright through its Linux activities, including its use, reproduction and improvement of Linux, and that some or all of SCO’s purported copyrights in UNIX are invalid and unenforceable.” ¶ 173. In other words, IBM is seeking to declare that a person or entity using Linux does not infringe upon SCO’s copyrights and that some or all of SCO’s copyrights are invalid or unenforceable.

These issues are being litigated in a case filed by SCO against AutoZone in federal district court in Nevada; a case that was filed prior to IBM’s filing its Tenth Counterclaim. *See The SCO Group Inc. v. AutoZone, Inc.*, Case No. CV-S-04-0237-DWH-LRL (D. Nev. 2004). This newly added counterclaim raises issues separate and apart from the primary breach of contract and other direct claims and counterclaims in this case. Given this fact, and to avoid multiple suits determining substantially similar issues, this Court should decline to exercise jurisdiction over and dismiss Counterclaim Ten. In the alternative, Counterclaim Ten should be stayed pending the outcome in the prior filed *AutoZone* case.

SCO's Motion is supported by the Memorandum in Support of Motion to Dismiss or to Stay Count Ten of Counterclaim-Plaintiff IBM's Second Amended Counterclaims Against SCO submitted concurrently herewith.

DATED this 26th day of April, 2004.

Respectfully submitted,

By:

A handwritten signature in black ink, appearing to read "Brent O. Hatch", is written over a horizontal line.

HATCH, JAMES & DODGE, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be emailed and mailed, postage prepaid, this 26th day of April, 2004, to the following:

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